

**ATTORNEY DISCIPLINARY CASES:
A GUIDE FOR HEARING OFFICERS**

Prepared by the Indiana Supreme Court,
Division of State Court Administration

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ATTORNEY DISCIPLINARY CASES

INTRODUCTION AND DISCLAIMER

This document is intended as a guide to assist hearing officers in the administration of duties involving attorney disciplinary cases. It was prepared by the staff of the Division of State Court Administration and is neither endorsed nor approved by the Indiana Supreme Court.

If you have questions, please contact the Indiana Supreme Court Division of State Court Administration at (317) 232-2542.

OVERVIEW

Indiana Admission and Discipline Rule 23 provides the framework for initiation and resolution of attorney discipline matters. The rule creates, organizes, and empowers the Indiana Supreme Court Disciplinary Commission and its staff. It also provides a procedure for filing grievances against attorneys, a system for the investigation of grievances, and a procedure for resolution should a grievance evolve into a formal complaint for disciplinary action against an attorney.

The Indiana Supreme Court may appoint up to three (3) hearing officers, who shall be members of the Bar of the Court and not members of the Disciplinary Commission, to preside over individual attorney disciplinary matters and to hear and determine charges. Admis.Disc.R. 23(11)(b). By custom and practice, the Court rarely appoints more than one hearing officer in attorney discipline cases.

The hearing officer guides the discovery process, conducts an evidentiary hearing, and submits a report to the Supreme Court. Admis.Disc.R. 23(13). While the formal rules of civil or criminal procedure do not apply strictly and a heightened standard of proof governs, this process is very similar to a civil bench trial in which there is a request for special findings of fact and conclusions of law.

As with most civil cases, the majority of attorney discipline matters never culminate in an evidentiary hearing. Instead, after the appointment of a hearing officer but before a hearing is conducted, the respondent and the Disciplinary Commission often reach an agreement for disposition of the complaint. Such “conditional agreements” are submitted to the Supreme Court for approval. Admis.Disc.R. 23(11)(c). The Court may approve a conditional agreement, reject a conditional agreement, or submit to the parties a proposed, alternative disposition. *Id.* When the Supreme Court rejects a conditional agreement, the Commission and the respondent often revise and resubmit their agreement to address the Court’s concerns, but should a case later go to trial, any prior conditional agreement is not admissible in evidence. *Id.*

In cases in which the hearing officer submits findings of fact to the Supreme Court following a hearing, the Supreme Court employs a *de novo* review of the entire record. However, the Supreme Court gives deference to the hearing officer's findings, particularly with regard to determinations as to the credibility of witnesses.

Hearing officers are paid for their work at rates established by the Supreme Court. A copy of the Supreme Court's 1993 fee schedule for hearing officers is attached in the "Appendix" to this document. Accordingly, hearing officers should itemize the time spent on cases and follow all applicable rules in seeking payment.

APPOINTMENT OF HEARING OFFICERS

The Supreme Court appoints a hearing officer upon the filing of a complaint for disciplinary action. The Disciplinary Commission files complaints when it determines that there is reasonable cause to believe the respondent is guilty of misconduct that would warrant disciplinary action. Admis.Disc.R. 23(11).

The Clerk of the Supreme Court will provide the hearing officer with a copy of the appointment order, the disciplinary complaint and any other filings in the case, and the acceptance of appointment and oath of office. The hearing officer should contact the Supreme Court Clerk's office at (317) 232-1930 if any of these materials are not provided.

The hearing officer must file with the Supreme Court Clerk's office the acceptance of appointment and oath within one (1) week after receipt of the appointment order. The hearing officer should distribute courtesy copies of the acceptance of appointment and oath to all counsel of record. A sample acceptance and oath form is included in the "Appendix" to this document.

The respondent, on a showing of good cause, may petition for a change of hearing officer within ten (10) days after the appointment of the hearing officer. Such petition should be filed with the Clerk of the Supreme Court, with a copy sent to the hearing officer and all counsel of record. Admis.Disc.R. 23(14)(a). The decision whether to grant a petition for change of hearing officer belongs exclusively to the Supreme Court and not to the hearing officer.

AUTHORITY OF HEARING OFFICERS

The authority of the Hearing Officer is found in Admis.Disc.R. 23(13):

In addition to the powers and duties set forth in the rule, hearing officers have the power and duty to:

- (a) Conduct a hearing on a complaint of misconduct within sixty (60) days after the hearing officer is appointed and has qualified;
- (b) Administer oaths to witnesses;

- (c) Receive evidence and make written findings of fact and recommendations to the Court; and
- (d) Do all things necessary and proper to carry out their responsibilities under this rule.

NOTE: Although this Rule requires the setting of a hearing within sixty (60) days, the first setting is often used as an attorney status conference or pre-hearing conference so that the hearing officer can become familiar with the issues in this case. The Disciplinary Commission routinely seeks the setting of a pre-hearing conference, but the hearing officer may schedule such a hearing *sua sponte*. There is no prohibition against conducting the pre-trial conference telephonically. Generally, hearing officers schedule pre-trial conferences after the respondent has answered the complaint, as such scheduling results in a pre-trial conference being held after the issues have been narrowed.

FILINGS

All pleadings, motions, and orders subsequent to the complaint, which are required to be served upon a party, must be filed with the Supreme Court Clerk's office, 217 State House, Indianapolis, IN 46204. Admis.Disc.R. 23(11.2). All documents tendered to the Clerk for filing must be served by the Clerk upon all parties or their counsel and the hearing officer.

The Supreme Court Clerk's office maintains the official record of the disciplinary proceeding and will archive it after its conclusion. Therefore, the hearing officer may maintain a case file during the pendency of the matter, but is not required to maintain the file after the conclusion of the case.

Pleadings and orders in disciplinary cases should not be filed in the trial court clerk's office in the county in which the hearing officer resides, works or conducts a disciplinary hearing.

VERIFIED COMPLAINT AND SUMMONS

In the event that the Commission determines that the misconduct would warrant disciplinary action and should not be disposed of through administrative action, then the Executive Secretary prepares a summons and verified complaint setting forth the misconduct and prosecutes the case. The complaint and summons are served upon the respondent.

ANSWERS TO THE COMPLAINT

An answer is required and must be filed within thirty (30) days after service of the summons and complaint or such additional time as may be allowed upon written application to the hearing officer setting forth good cause. Admis.Disc.R. 23(14)(a).

A written application for enlargement of time to answer, if filed on or before the due date

of the answer, shall be automatically allowed for an additional thirty (30) days from the original due date **without a written order** of the hearing officer. Any further motion for enlargement of time to answer must be sought by written motion and shall be granted by the hearing officer only for good cause shown. Admis.Disc.R. 23(14)(a). Should the first motion for extension of time to answer be filed before a hearing officer is appointed, the extension is still deemed granted upon filing without an order.

The answer shall admit or controvert specifically the averments set forth in the complaint. If the respondent lacks knowledge or information sufficient to form a belief as to the truth of an averment, the respondent shall so state and his statement shall be considered a denial. Adm.Disc.R. 23(14)(b).

Averments in a complaint are admitted when not denied in the answer. An answer may assert any legal defense. *Id.*

PRE-HEARING AND DISCOVERY MATTERS

Information concerning pre-hearing and discovery matters is found in Admis.Disc.R. 23(14):

- The rules of pleading and practice in civil cases do not apply.
- No motion to dismiss or dilatory motions shall be entertained.
- Discovery is available to the parties on terms and conditions that, as nearly as practicable, follow the Indiana Rules of Civil Procedure pertaining to discovery proceedings.
- All notices connected with processing of the disciplinary complaint shall be issued only under the direction of the hearing officer or hearing officers. No other court or judicial officer (with the exception of the Supreme Court under circumstances set forth in Admis.Disc.R. 23) shall have jurisdiction to issue any order or process in connection with a disciplinary complaint.
- Upon request of a party, the hearing officer may issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party or that party's attorney, who shall complete it before service.
- The hearing officer may also authorize counsel acting in a representative capacity to issue and sign such subpoena as an officer of the court. Accordingly, it is not permissible for a respondent attorney, acting pro se, to sign subpoenas.
- Subpoenas for the attendance of witnesses and production of documentary evidence shall conform to the provisions of Ind. Trial Rule 45.
- The hearing officer shall have authority to enforce, quash or modify subpoenas upon proper application by an interested party or witness.
- A Pre-Hearing Conference is to be held at the discretion of the hearing officer or upon request of either party. The purpose of the pre-hearing conference is to: (1) obtain admissions; (2) narrow issues; (3) require witness lists, including addresses, and the general nature of testimony; (4) consider Amendments to

the Complaint or Answer; and (5) other matters deemed proper by the hearing officer.

NOTE: Hearing officers are encouraged to set deadlines (completion of discovery, filing of witness and exhibit lists, etc.) either by order or at the pre-hearing conference. Without such deadlines, a party may appear at hearing with witnesses or documents not seen by opposing counsel and use this technique to secure a continuance.

JUDGMENT ON THE COMPLAINT

Should the respondent fail to answer the complaint, the Disciplinary Commission may move for judgment on the complaint. Upon a motion for judgment on the complaint and in the absence of any answer by the respondent, the hearing officer shall take the facts alleged in the complaint as true and promptly render a report to the Supreme Court. The use of the word "shall" in the rule appears to remove the hearing officer's discretion to decline to render a judgment on the complaint in the absence of an answer by the respondent. The report shall be in conformity with the provision of the findings of fact following a hearing. (*See Findings, infra.*)

Notice of the Disciplinary Commission's motion for judgment on the complaint must be served on the respondent, or counsel if represented, at least seven (7) days before a hearing on the motion. Admis.Disc.R. 23(14)(c). Hearing on the motion for judgment on the complaint need only be held if the respondent has appeared in person or by counsel.

EVIDENTIARY HEARING

Information concerning proceedings before the hearing officer is found in Admis.Disc.R. 23(14).

- Rules of pleading and practice in civil cases shall not apply; a hearing officer may use such rules as guidance.
- No motions to dismiss or dilatory motions shall be entertained. Accordingly, the hearing officer has no authority to grant or entertain dispositive motions such as motions to dismiss or motions for summary judgment. If such a motion is filed, the hearing officer may simply refuse to entertain the motion.
- The case is heard on the complaint and answer.
- Written notice of a hearing date must be given to parties not less than fifteen (15) days prior to such hearing.
- Respondent shall have the right to: (1) attend the hearing in person; (2) be represented by counsel; (3) cross examine the witnesses; (4) both produce and require the production of evidence and witnesses on his or her behalf at the hearing as in civil proceedings.
- The proceeding may be summary in form and shall be without jury.
- The proceeding shall be reported. The hearing officer may require the transcription of the hearing to assist in preparation of the findings of fact and conclusions of law. Also, either party may ask the hearing officer to order such transcription. In some cases, the audiotape of the hearing, rather than a

- transcription of that tape, has been made part of the official record of proceedings.
- Transcript costs shall be borne by the party requesting preparation of the transcript. Should the hearing officer request production of the transcript for preparation of findings of fact, the cost of the transcript shall be borne by the Supreme Court.

The hearing officer may choose the site for any hearing. If the hearing officer is a judge, the hearing officer may set the hearing in the hearing officer's courtroom. All hearing officers, however, may opt to conduct any hearings in Supreme Court facilities in downtown Indianapolis. The Disciplinary Commission also has a conference room at its offices in downtown Indianapolis that may be used for hearings. The hearing officer should contact the Disciplinary Commission about the availability of such space before setting a hearing in those facilities. Hearings may also be held at any other location that is convenient to the parties or witnesses.

FINDINGS

Information concerning the Findings of Fact and Conclusions of Law is found in Admis.Disc.R. 23(14). The Disciplinary Commission must prove misconduct by clear and convincing evidence. After the conclusion of the hearing, the hearing officer shall determine within thirty (30) days whether misconduct has been proven and submit to the Supreme Court written findings of fact and conclusions of law. The hearing officer also may make a recommendation, at the request of either party or on the hearing officer's own motion, concerning disposition of the case and the imposition of discipline. These findings of fact, conclusions of law and recommendation are not binding on the Supreme Court, which reviews disciplinary matters *de novo*.

The hearing officer shall serve a copy of findings and any recommendation to the Respondent or counsel for the Respondent and the Executive Secretary of the Disciplinary Commission or trial counsel for the Disciplinary Commission at the time of filing with the Supreme Court.

In the Findings, the Hearing Officer may include the following information, based on evidence submitted at hearing:

- A showing that Respondent is an attorney admitted to practice law in Indiana (jurisdictional);
- The burden of proof used;
- Factual findings;
- Legal conclusions (rules violated);
- Any aggravating circumstances, including, but not limited to, prior disciplinary actions and sanctions, lack of personal accountability for various acts of professional misconduct, disregard for ethical rules, actual or potential harm to clients, disregard for clients, and pattern of misconduct; and,
- Any mitigating circumstances, including, but not limited to, cooperation at hearing and with the Disciplinary Commission, remorse for harm caused to clients, respondent's mental state, seeking psychiatric or professional help, no

prior disciplinary actions, admitted wrongdoing, and the misconduct was an isolated occurrence. *See e.g.*, Standards of Imposing Lawyer Sanctions, American Bar Association, 1991 Edition.

- A recommendation as to the discipline to be imposed is optional.

SANCTIONS

The hearing officer may make a recommendation as to sanction *sua sponte* or upon request by either of the parties. This recommendation is not binding on the Court.

Sanctions, pursuant to Admis.Disc.R. 23(3)(a), include, but are not limited to:

- a private reprimand;
- a public reprimand;
- probation;
- suspension from the practice of law for a definite or indefinite period of time (with or without the requirement the respondent formally petition the Supreme Court should he later choose to seek readmission); or,
- disbarment.

Any suspension for a period of more than six (6) months must be without automatic reinstatement. An attorney who has been disbarred may never petition the Supreme Court for readmission. Sanctions also may include conditions, such as participation in counseling, treatment, education, or continued monitoring by the Commission. Often, the Judges and Lawyers Assistance Program (JLAP) is involved in appropriate cases in which such probationary or aftercare terms are used.

SUSPENSION PENDING FINAL RESOLUTION

The Commission may seek suspension of an attorney prior to hearing under certain circumstances. Admis.Disc.R. 23(11.1). The Supreme Court rules on such motions, not the hearing officer. A hearing officer does not have authority to order the suspension of a respondent. However, a hearing officer may be asked to conduct a hearing on an interim suspension request, as set forth below.

A. Suspension pending prosecution

The Commission will move for suspension pending prosecution upon two-thirds vote of the Commission members that: 1) the continuation of the practice of law by an attorney during the pendency of a disciplinary investigation or proceeding may pose a substantial threat of harm to the public, clients, potential clients, or the administration of justice, and 2) the alleged conduct, if true, would subject the respondent to disciplinary sanctions. Admis.Disc.R. 23(11.1)(b). The respondent has fourteen (14) days after service of the petition to respond. The Court may grant or deny the petition for suspension or refer the matter to the hearing officer.

If a petition for interim suspension is referred to a hearing officer, the hearing officer must conduct a hearing on the suspension within thirty (30) days of the date of referral

and render a report to the Court within fourteen (14) days of the hearing. Admis.Disc.R. 23(11.1)(b)(4). The procedures employed at the hearing on the interim suspension are the same as those used for the final hearing upon the complaint and answer. Thus, the Commission typically makes the first presentation of evidence and has the right to open and close argument. However, the Commission's burden of proof in an interim suspension hearing differs from that applicable to the final hearing on the complaint. The Commission must prove by a preponderance of the evidence that an interim suspension is merited. At the final hearing, the Commission must prove by clear and convincing evidence the misconduct charged in the complaint.

NOTE: Generally, interim suspension hearings focus on the most serious charges allegedly justifying the interim suspension.

Admission and Discipline Rule 23(14) provides that the hearing officer's report to the Court must contain findings of fact and a recommendation as to suspension. The hearing officer's report will also contain conclusions of law, even though Admis.Disc.R. 23 does not specifically refer to this component. The Court may order the interim suspension or impose temporary conditions of probation where the Commission has shown by a preponderance of the evidence that the respondent's continued practice of law during the pendency of the disciplinary investigation or proceeding may pose a substantial threat of harm to the public, clients, potential clients, or the administration of justice, and the conduct would subject the respondent to disciplinary sanctions. Admis.Disc.R. 23(11.1)(b)(5). The order of suspension or probation will remain in effect until disposition of the disciplinary proceeding or further order of the Court.

The respondent may seek the dissolution or amendment of the interim suspension or probation by filing with the Supreme Court a verified motion setting forth specific facts demonstrating good cause. Admis.Disc.R. 23(11.1)(b)(6). The Court may refer the motion to a hearing officer, who shall proceed according to Admis.Disc.R. 23(11.1)(b)(5): the hearing officer shall conduct a hearing on the motion within 30 days of the date of referral and render a report to the Court – including findings of fact and a recommendation – within fourteen (14) days of the hearing.

If an interim suspension or probation is ordered and no disciplinary complaint has been filed, the Commission must file a complaint for disciplinary action within sixty (60) days of the interim suspension or probation. Admis.Disc.R. 23(11.1)(b)(7). Where the respondent is under interim suspension or probation, the hearing officer must expedite disposition of the disciplinary complaint. *Id.*

B. Suspension upon guilty finding

An interim suspension also may be sought where an attorney licensed in Indiana is found guilty of a crime punishable as a felony under the laws of any state or the United States. Admis.Disc.R. 23(11.1)(a). The Disciplinary Commission is obligated to inform the Supreme Court of the conviction, and the Supreme Court may suspend the attorney

pending final resolution of resulting disciplinary charges. Typically, a hearing officer is not directly involved in these proceedings.

C. Suspension for failure to cooperate with Disciplinary Commission

An attorney's failure to cooperate with the Disciplinary Commission's investigation of that attorney may result in the interim suspension of that attorney. *See* Admis.Disc.R. 23(10)(f). Such suspensions may be based on a failure to submit a written response to pending allegations of professional misconduct, to accept certified mail from the Commission, to respond to a subpoena from the Commission, to appear at any hearing on the matter under investigation, or to comply with any other lawful demand for information made by the Commission. *Id.* The Commission's request for a noncooperation suspension is filed with the Supreme Court, which issues a show cause order directing the attorney to respond within ten (10) days. The Court may suspend the attorney thereafter, with or without a hearing, upon a finding that the attorney failed to cooperate as outlined in Adm.Disc.R. 23(10)(f). This rule does not provide for referral of the matter to a hearing officer. A similar procedure attaches to an attorney's delinquency in the payment of child support. Admis.Disc.R. 23(11.1)(c). Upon resolution of "noncooperation" matters, the Supreme Court may impose costs upon the respondent attorney. Admis.Disc.R. 23(10)(f)(5).

PROCEEDINGS TO DETERMINE DISABILITY

Admission and Discipline Rule 23(25) provides a procedure where the Disciplinary Commission may move for a proceeding to determine whether an attorney is disabled by reason of physical or mental illness or infirmity, or because of the use of or addiction to intoxicants or drugs. Such a proceeding may be initiated by a member of the Commission, a member of the bar, the Executive Secretary, any individual or any bar association of this State by the filing of a verified petition with the Commission alleging the attorney is disabled. Admis.Disc.R. 25(a). If the petition is filed by an Indiana attorney, an individual or by a bar association, the Executive Secretary of the Commission conducts an investigation and makes a report to the Commission with a recommendation to the Commission at its next meeting. Admis.Disc.R. 25(b).

If the Disciplinary Commission determines that there is good reason to believe that a disability exists which would justify suspension of the attorney named in the petition, the Commission will move the Supreme Court for a hearing to determine whether the attorney should be suspended. Admis.Disc.R. 25(c). The Commission may request the Supreme Court to appoint one or more hearing officers to conduct that hearing. The hearing officer(s) may, but shall not be required to be, a member of the Disciplinary Commission. *Id.* The hearing officer has the same powers as a hearing officer appointed to hear a complaint of professional misconduct. Admis.Disc.R. 23(13), (18)(b) and (25)(c). The hearing officer shall submit written findings and recommendations to the Commission, rather than directly to the Court. *Id.* The Admission and Discipline Rules do not impose a deadline on submission of such findings, but hearing officers should attempt to submit their findings and recommendations to the Commission within thirty

(30) days after the final hearing.

After receipt of the hearing officer's findings and recommendations, the Commission reports its findings and recommendations to the Supreme Court. If the Commission recommends suspension, the respondent attorney may petition the Supreme Court for review of those findings within thirty (30) days of the filing of the report and recommendation. If no petition for review is filed, the Court enters an order of suspension for the duration of the attorney's disability. Admis.Disc.R. 23(25)(d).

PETITIONS FOR REINSTATEMENT

The Supreme Court may appoint a hearing officer, at the Commission's request, to hear a petition for reinstatement from an attorney who has been suspended or who has resigned from the bar. The rule provides that a hearing officer for a petition for reinstatement may, but shall not be required to be, a member of the Disciplinary Commission. Such a hearing officer has the same powers as a hearing officer appointed to hear a complaint of professional misconduct. Admis.Disc.R. 23(13), (18)(b) and (25)(c). The hearing officer shall determine whether the petitioner has met the requirements set forth in Admis.Disc.R. 23(4) and make written findings and recommendations to the Commission. Admis.Disc.R. 23(18)(b). The Admission and Discipline Rules do not impose a deadline on submission of such findings, but hearing officers should attempt to submit their findings and recommendations to the Commission within thirty (30) days after the hearing.

After receipt of the hearing officer's recommendations, the full Commission submits its recommendation to the Supreme Court. The applicant for reinstatement may petition the Supreme Court for a review of the recommendation within thirty (30) days after that recommendation is filed. *Id.*

PUBLIC DISCLOSURE

Information concerning public disclosure of disciplinary proceedings is found in Admis.Disc.R. 23(22).

After a verified complaint has been filed with the Supreme Court, all proceedings and all papers filed of record with the Clerk, except adjudicative deliberations, shall be open and available to the public.

Proceedings and papers that relate to matters that have not resulted in the filing of a verified complaint shall not be open and available to the public. Investigative reports and other work product of the Disciplinary Commission shall be confidential and not open to public inspection.

Hearings before hearing officers shall be open to the public. However, hearing officers may, in the exercise of sound discretion, order a closed hearing or other appropriate relief on the motion of the hearing officer, or at the request of the Commission or the

respondent, if, in the opinion of such hearing officer, the conduct of a closed hearing is necessary for any of the following purposes:

- (1) For the protection of witnesses;
- (2) To prevent likely disruption of the proceedings;
- (3) For the security of the hearing officer, or any of the parties to the proceedings;
- (4) To prevent the unauthorized disclosure of attorney-client confidences not at issue in the proceeding;
- (5) For any other good cause shown which in the judgment of the hearing officer requires such hearing to be closed.

If the hearing officer closes the hearing, an order to that effect setting forth the reasons for the closure should be filed before the hearing is conducted. Hearing officers also have the authority to seal specific documents for the same reasons as would justify closure of the hearing.

MISCELLANEOUS MATTERS

Pauper counsel requests and reimbursement of items of expense:

The Admission and Discipline Rules do not speak to the issue of pauper counsel or payment of expert witnesses and other investigatory costs. In at least two instances, one in a published opinion, the Supreme Court has ruled that pauper counsel is not available to respondents. *See, e.g., Matter of McCord*, 722 N.E.2d 820, 822 (Ind. 2000) (“There is no right to appointment of pauper counsel at public expense in an attorney disciplinary proceeding.....Accordingly, the fact that the hearing officer denied the respondent's request for pauper counsel in this case does not indicate that the respondent was denied due process.”)

Motions to dismiss:

Admission and Discipline Rule 23(14) provides that, during proceedings before the hearing officer, no motions to dismiss shall be entertained. However, motions to dismiss are sometimes filed by the respondent or the Disciplinary Commission during the pendency of proceedings before the hearing officer. For example, the Disciplinary Commission might move for dismissal of the verified complaint upon reconsideration of its initial determination of probable cause, or the respondent might move to dismiss the verified complaint upon jurisdictional grounds. *See, e.g., Matter of Fletcher*, 655 N.E.2d 58 (Ind. 1995) (respondent's motion to dismiss based on alleged lack of jurisdiction of Supreme Court due to *pro hac vice* appointment was denied). Such motions will be considered and resolved by the Supreme Court directly without intervention of the hearing officer.

Appeals from hearing officer decisions made prior to final hearing:

Neither the respondent nor the Commission may appeal to the Supreme Court any pre-hearing rulings of the hearing officer before final judgment.

Conditional agreements:

The parties submit all conditional agreements that might dispose of the disciplinary case to the Supreme Court, without review by the hearing officer. Those agreements are not filed with the Clerk's office. Instead, they are submitted to the Division of State Court Administration, which presents them to the Supreme Court. If approved, the Court issues an order or opinion imposing the agreed sanction.

Supreme Court Review:

Once the hearing officer files the findings with the Supreme Court, the hearing officer's involvement in the case generally concludes, despite the fact that the Disciplinary Commission and the respondent may seek review of those findings by the Supreme Court. Admis.Disc.R. 23(15). The hearing officer will file findings in the Supreme Court Clerk's office. Generally, the hearing officer's file (i.e., pleadings filed before the hearing officer, exhibits, etc.) is transmitted to the Supreme Court Clerk at this time. The hearing officer may also submit an itemized statement of services rendered so that the Supreme Court may compensate the hearing officer for her service, pursuant to the order issued by the Supreme Court in 1993 (see attachment to this manual).

Record on review:

Where a party files a petition for review challenging a factual finding by the hearing officer, the petitioner is required to file a record of all the evidence before the hearing officer relating to the factual issue. The record should include a transcript, which must be "settled, signed and certified as true and correct by the hearing officer." Admis.Disc.R. 23(15)(c). The party requesting the transcript pays the costs of the transcript.

APPENDIX

PAYMENT SCHEDULE FOR HEARING OFFICERS
ACCEPTANCE OF APPOINTMENT AS HEARING OFFICER AND OATH
OF OFFICE FORM

PAYMENT SCHEDULE FOR HEARING OFFICERS



IN THE MATTER OF

SUPREME COURT OF INDIANA

IN THE MATTER OF)
FEES PAID TO HEARING OFFICERS) Case No. 94500-930645-645
IN DISCIPLINARY CASES)

ORDER ESTABLISHING PAYMENT SCHEDULE FOR HEARING OFFICERS

Whenever this Court appoints a hearing officer to preside over an attorney disciplinary proceeding pursuant to Admission and Discipline Rule 23, said hearing officer shall be compensated in accordance with the following schedule of payment:

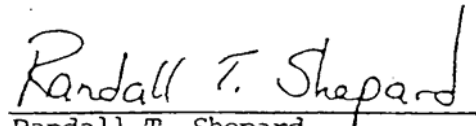
For the preparation of all entries, study, research
and all necessary non-hearing service \$70.00 per hour
For either pretrial or trial hearing \$280.00 per day
For hearing of 1/2 day or less \$140.00 per day
For reviewing evidence and preparing findings
of fact and conclusions \$70.00 per hour
For all necessary out of pocket expenses
(telephone calls, postage, etc.) ALL EXPENSES
For all travel necessary to the conduct of such case \$.25 per mile

At the termination of all services in a particular case, the hearing officer should submit a statement of services pursuant to the above schedule. The statement should be forwarded to the Supreme Court Administrator, 200 West Washington Street, Room 312, Indianapolis, IN 46204.

The Clerk of this Court is directed to transmit a copy of this ORDER with every ORDER APPOINTING A HEARING OFFICER to the appointed hearing officer.

This schedule of payment shall be effective for hearing officer appointments made after the issuance of this ORDER. Compensation for previously appointed hearing officers is governed by this Court's ORDER of August 30, 1985.

DONE at Indianapolis, Indiana, this 16th day of June, 1993.


Randall T. Shepard
Chief Justice of Indiana

All Justices concur.

IN THE
SUPREME COURT OF INDIANA

IN THE MATTER OF)
)
) Cause No.
)

ACCEPTANCE OF APPOINTMENT AS HEARING OFFICER
AND
OATH OF OFFICE

I, _____, having been appointed as
Hearing Officer in this matter of the _____ day of _____, 20____, do
hereby accept such appointment and do solemnly swear that I will uphold the
Constitution and the Laws of the United States of America and the Constitution and Laws
of Indiana, and will honestly and faithfully discharge my duties to the best of my ability,
So Help Me God.

Hearing Officer

Dated: _____



DISCIPLINARY COMMISSION
OF THE
SUPREME COURT

DONALD R. LUNDBERG
EXECUTIVE SECRETARY

115 West Washington Street
Suite 1165 South Tower
Phone (317) 232-1807
Fax (317) 233-0261
TDD For Deaf: (317) 233-6111

SAMPLE PRE-HEARING CONFERENCE AGENDA

Prepared by Donald R. Lundberg

Preliminary Consideration: Whether to conduct pre-hearing conference telephonically or by personal attendance of counsel and/or respondent. The Disciplinary Commission staff is willing to make the arrangements for conducting conferences telephonically.

- Representation of the parties
 - Is the respondent *pro se* or represented by counsel?
 - Determine if a *pro se* respondent contemplates retaining counsel.
 - Who will be handling the matter for the Disciplinary Commission?
- Hearing dates and times
 - Amount of time required for hearing.
- Hearing location
 - Options: hearing officer's courtroom, Supreme Court conference room, Disciplinary Commission conference room, elsewhere.
 - Considerations: convenience of hearing officer, witnesses, parties and other participants, and availability of hearing facility.
 - Who will make arrangements for scheduling hearing facility?
- Reporting proceedings
 - Hearing Officer's court reporter
 - Contract court reporter

- Who will make court reporter arrangements?
- Status of pleadings
 - Contemplated amendments to charging complaint.
 - Timely answer by respondent?
- Discovery
 - To what extent will the parties be able to handle discovery matters without the intervention of the hearing officer?
 - Other anticipated discovery issue or disputes.
- Witness attendance
 - Hearing officer may require that all subpoenas be signed and issued by the hearing officer.
 - Hearing officer may authorize counsel to sign and issue subpoenas as contemplated by Trial Rule 45(A)(2). See Admis.Disc.R. 23(14)(f). This authority should be included in the pre-hearing order.
- Possibility of resolution by agreement or narrowing or simplification of issues by stipulation
- Case scheduling
 - Final hearing on the merits.
 - Exchange of witness and exhibit lists (preliminary and/or final).
 - Discovery cut-off date.
 - Pre-hearing briefs, if any.
 - Necessity for and date of additional or final pre-hearing conferences
- Special case needs
 - Foreign language translators.
 - Witnesses who need special accommodations.

IN THE
SUPREME COURT OF INDIANA

IN THE MATTER OF:)
)
) Cause No.:
)

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The Court, after having taken the evidence at hearing under advisement, having reviewed the Transcript of the hearing, Briefs and Proposed Findings and Conclusions submitted by the Commission and the Respondent NOW FINDS, CONCLUDES and RECOMMENDS as follows:

FINDINGS OF FACT¹

1. Respondent is an attorney in good standing, having been admitted to practice law in the State of Indiana on October 13, 1976.
2. The Respondent is a Certified Public Accountant as well as a licensed attorney and conducts business in both professions at the same location.
3. The Indiana Supreme Court Disciplinary Commission filed a Complaint for disciplinary action on March 27, 1996. In the Complaint, the Respondent is alleged to have violated Indiana Rules of Professional Conduct 1.2(a), 1.5(a), 5.3(c), 7.2(a), 7.2(b) and 8.4(a).

COUNT I
DUAL LETTERHEAD & TRADE NAME ALLEGATIONS
Rule 7.2

¹The Findings and Conclusions contain footnotes. These footnotes are not intended to part of the Findings or Conclusions but are merely meant to refer to supporting evidence from which the Finding or Conclusion was drawn. There are also headings within the Findings and Conclusions which are not intended to limit the application of the Findings or Conclusions to the heading under which they are presented.

4. The Commission's Verified Complaint alleges violations under Count I of Rule 7.2(a) and Rule 7.2(b). Rule 7.2(a) and (b) read at the time in question:
 - a. "A lawyer or law firm shall not use or participate in the use of...letterhead if it includes a statement or claim that is false, fraudulent, misleading, deceptive, self-laudatory or unfair within the meaning of or that violates the regulations contained in Rule 7.1."
 - b. "A lawyer shall not practice under a name that is misleading as to the identity, responsibility, or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, deceptive, self-laudatory or unfair within the meaning of Rule 7.1, or is contrary to law. In that it is inherently misleading, a lawyer in private practice shall not practice under a trade name."
5. The Respondent practices law as "_____, Attorney at Law" and practices accounting as "_____, nc."
6. The Respondent's practice of law was and is a sole proprietorship which had no employees other than the Respondent.
7. During the time period in question, no legal work went out of the office, but with the Respondent's signature.²
8. During the time period alleged in the Complaint, the Respondent conducted both his accounting a law practices with letterhead listing both accountants and lawyers (properly designated as CPA, Attorney or both) and with a header as below³ (hereafter the "dual letterhead").

_____, J.D., CPA
PROFESSIONAL SERVICES GROUP

INDIANAPOLIS, INDIANA 46240

9. The dual letterhead further contained the statement, "WE HELP YOU CREATE AND PRESERVE WEALTH"
10. The only difference between letters sent from the Respondent's office for accounting services and letters sent from the office legal services was the signature block which would indicate below the signature, the designation "Attorney at Law" or "Certified Public Accountant." There were occasions, however, on which letters were sent without any or without the proper designation in the signature block.
11. The dual letterhead lists attorneys not employed by the law practice of the

²Testimony of the Respondent. R. 233.

³The font and size are approximate. See Commission's Exhibit AA.

Respondent.

12. The dual letterhead lists CPAs not employed by the law practice.
13. Legal services and accounting services are "professional" services.
14. The dual letterhead, with its inclusion of additional attorneys and CPAs who are not employed by the law practice and the inclusion of a statement of purpose regarding the preservation of wealth, could reasonably create the impression of special or expert knowledge in the accounting and tax fields.
15. Interim fee statements sent to clients from the law practice, envelopes and other documents also contained the term "Professional Services Group." as did the dual letterhead⁴
16. The professionals in the office were six in number consisting of three who were licensed attorneys in the State of Indiana. Those 3 are the Respondent,
 17. sent a letter on the dual letterhead containing the following language: "...we are a firm with over twenty-three years of **extensive experience** in tax, accounting and business consulting matters. Unlike the traditional law or accounting firm, our professional firm is built around attorneys and CPA's all of whom have the credentials and experience required to properly address the **business needs** of an entrepreneur such as yourself."⁵
 - a. The Respondent had at least some part in drafting the letter, and was aware that the letter was being sent.⁶
18. The Respondent's practice of law uses the services of persons employed by the accounting practice. The services of such persons are billed to the legal client.⁷
19. At least one client, , was and had reason to be confused about the skills and level of expertise he could expect from the law practice. His Request for Investigation refers to the Professional Service Group" and later

⁴Testimony of Respondent. R. 281, Exhibits 6, 14 and A1.

⁵Exhibit AA.

⁶Testimony of, . R. 183-184.

⁷Respondent's testimony. R. 266.

to "this CPA firm."⁸

- a. Other than billing matters, the purely legal work done for _____ was done by _____ who was on the dual letterhead as an attorney, but not an employee of or responsible to the law practice.
 - b. _____ indicates that he contacted or was contacted by _____ of the _____ Professional Services Group."
 - c. _____ could have reasonably assumed that _____ was responsible to and/or with the Respondent in providing competent legal service as part of a "group" including attorneys and CPAs.
20. Neither the attorneys other than the Respondent nor the CPAs listed on the dual letterhead are or were associated with or under any obligation to the law practice to create a work product which demonstrated the benefit of their collective knowledge. The dual letterhead creates the impression that they are associated with the ability to create such a work product.
21. The Respondent no longer uses the dual letterhead.

COUNT II
THE COMPLAINT OF _____
Rules 1.2(a), 1.5(a), 5.3© & 8.4(a)

22. The Commission's Verified Complaint, alleges violations under Count II of Rules 1.2(a), 1.5(a), 5.3© and 8.4(a).
- a. Rule 1.2(a) read at the time in question: "A lawyer shall abide by a client's decisions concerning the objectives of representation...and shall consult with the client as to the means by which they are to be pursued."
 - b. Rule 1.5(a) read: "A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee shall include the following:
 - i. the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;
 - ii. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - iii. the fee customarily charged in the locality for similar legal services;
 - iv. the amount involved and the results obtained;
 - v. the time limitations imposed by the client or by the circumstances;
 - vi. the nature and length of the professional relationship with the client;
 - vii. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - viii. whether the fee is fixed or contingent."
 - c. Rule 8.4(a) read: "It is professional misconduct for a lawyer to violate...the Rules of Professional Conduct...through the acts of another."
23. The Commission has withdrawn its allegation under Rule 5.3© with respect to the

⁸Exhibit 11.

grievance by

24. Collection work is done most often within a contingency fee structure,⁹ but it is not improper to bill hourly for such work.¹⁰
25. was billed on an hourly basis. However, neither the engagement letter nor the fee agreement indicate any limit on the attorney's hourly rate to be charged.
- The fee agreement indicates a rate for nonclerical work of "...to \$250 OR MORE PER HOUR..."
 - The fee agreement further indicates that "our fees for services rendered may be determined to be a PERCENTAGE OF THE HOURLY BASED CHARGES...from 70 to 300% of hourly charges but can be lower or much higher if we deem it appropriate."
 - The fee agreement also states, "You agree to pay a CARRYING CHARGE of 1.50% per month (18% annual percentage rate) on any balance unpaid 30 days after the original statement date and unpaid each 30 days thereafter."
 - The fee agreement further states, "You agree to pay COLLECTION COSTS resulting from any disagreement, litigation or time spent involving us and our services rendered under this agreement. Collection costs include...time spent by our personnel at our prevailing hourly rates...."
26. The billing activities with regard to the representation are as follows:¹¹
- The fee statement for services rendered in February indicates:
 - On 2/7/95 "Review of matter with ; Request for information needed for collection and letter concerning representation" by indicating one hour of work and charging \$140.00 and
 - On 2/9/95 "Regarding engagement and letter" by the Respondent indicating .5 hours of work and charging \$100.00.
 - The fee statement for services rendered in March indicates:
 - On 3/4/95 "Regarding status of case, fee agreement and engagement letter returned" by the Respondent indicating .6 hours of work and charging \$120.00,
 - On 3/7/95 "Review matter for collectibility; check Print Mart and the Promotions Lab with Secretary of State; Check for listings for Review loan correspondence and documentation" by indicating one hour of work and charging \$140.00, and
 - On 3/13/95 "Letter on Collection" by indicating .5 hours of work and charging \$70.00.

⁹Testimony of R. 120.

¹⁰Testimony of R. 132. Testimony of i. R. 164.

¹¹Exhibit 14.

27. The Fair Debt Collection Practices Act ("the Act") applies to consumer and not to corporate debts.¹²
28. The inclusion of the Act language necessary to make a request for payment of a debt is standard and consists of only a few sentences.¹³
29. hired the Respondent in January 1995 to assist in the collection of a debt he represented was owed by in the amount of \$5,000.00 loaned to her in 1987 for the purpose of starting a business.
30. is referred to as a "friend" of in the Respondent's notes of a phone conversation on January 10, 1995. Those notes indicate that was in the printing business, and include a notation for "Print Market" with a street address and Indianapolis phone number.¹⁴
31. On February 2, 1995, received a facsimile from indicating, among other things, a corporation called "The Lab, Inc." with an Indianapolis post office box address and phone number.¹⁵ Because of the signature line in which identifies herself as President of The Lab and the language indicating the loan was to The Lab, Inc., had very good reason to believe as early as February 2 that the loan was a corporate and not a consumer debt.
32. On February 9, 1995, made a memo to the Respondent, among others, indicating knowledge of the administrative dissolution of The Lab, Inc. and an address which appears to be a personal address for .¹⁶ Almost all of the 3 pages of notes accompanying the memo consist of a hand written engagement letter.
33. On or about February 9, 1995, the Respondent sent an engagement letter outlining the services which would be performed on behalf of .¹⁷ The letter is substantively and linguistically almost identical to the notes contained in memo of the same date.

¹²Testimony of , R. 125.

¹³Testimony of , R. 126-128.

¹⁴Exhibit 1.

¹⁵Exhibit 2.

¹⁶Exhibit 3.

¹⁷Exhibit 4.

34. On February 23, 1995, _____ received a facsimile from _____ including the Agreement for the original debt. The Agreement was signed by _____ as President of The _____ Lab, Inc.¹⁸ _____ knew or should have known with certainty, upon review of this information, that the debtor was a corporation,¹⁹ and _____ knew or should have known that the Act did not apply.²⁰
35. _____ signed and returned the engagement letter on or before March 6, 1995²¹ as well as a fee agreement. The services listed in that letter included a review of the matter, investigation regarding _____ current address, collection efforts, the taking of appropriate legal action and actual collection.
36. On or about March 14, 1995, the Respondent signed and sent a letter to _____ explaining the potential difficulties of collecting the debt, making a recommendation as to future action, and asking _____ to contact _____ if he wished to proceed.²²
37. Neither the Respondent nor any person at the Respondent's office, either before or after the March 14th letter, made any attempt to contact _____ or any business which might pay the debt to be collected.
38. On or about May 15, 1995, _____ sent a letter refusing to pay the approximately \$583.00 charged to him and terminating the representation.²³
39. After receipt of the letter from _____ terminating the representation, the Respondent signed and sent a letter in which _____ was billed an additional \$360.00 for services consisting of an examination of his complaints and a letter responding to the same and demanding payment.²⁴

¹⁸Exhibit 5.

¹⁹Testimony of _____, R. 147.

²⁰Testimony of _____ in which he states that he would not charge a client for the caution of researching application of the Act once he knew the debt was a corporate rather than a consumer debt. R. 137.

²¹The fee agreement is Exhibit 6. The Respondent's signature is dated March 6, 1995, and the Respondent indicates in his response to the _____ grievance (Exhibit 12) that he signed the agreement upon its return with _____ signature.

²²Exhibit 7.

²³Exhibit 8.

²⁴Exhibits 9 and 14.

40. Well over half of the total bill to _____ was for work designed exclusively for the Respondent to collect his fee.
41. _____ was charged both the carrying charge for his unpaid bill and for additional work after he terminated the representation to respond to his refusal to pay.
42. In determining the reasonableness of the fee charged to _____, there is no indication that the bill should have been more or less than the customary fee due to the (1) time and labor required, (2) the likelihood of the attorney being precluded from other work, (3) time limitations or (4) the nature of the professional relationship.
43. The only relevant factors in determining reasonableness of the fee in the representation are (1) the customary fee, (2) the amount charged in relation to the results obtained and (3) whether the fee was fixed or contingent.
44. Under the facts involved in the _____ representation, the customary fee would have been contingent upon results and thus would have been zero instead of \$967.68.²⁵
45. There were no results obtained for the benefit of _____

COUNT III
THE COMPLAINT OF
Rules 1.2(a), 1.5(a), & 8.4(a)

46. The Commission's Verified Complaint alleges violations under Count III of Rules 1.2(a), 1.5(a) and 8.4(a).²⁶
47. _____ contacted Respondent's office on June 24, 1994 regarding a tax matter or matters including an offer in compromise, and, speaking to the Respondent, made an appointment to come into the Respondent's office for a conference.
48. _____ was charged \$52.50²⁷ for the June 24th telephone conference during which

²⁵Exhibit 14.

²⁶The relevant texts of the Rules are set out in the Findings under the Count II heading.

²⁷Exhibit AJ p. 5.

- at least some substantive legal advice was given.²⁸ paid this bill promptly.
49. visited Respondent's office on June 28, 1994 and met with and the Respondent.
50. During the June 28th meeting, suggested bankruptcy as an alternative to an Offer in Compromise as a solution to tax problem, and asked several questions about bankruptcy.
51. did substantial research based on June 28th meeting notes in an effort to answer the questions posed by at the meeting.
52. On July 27, 1994, contacted by phone and asked that he come to the office to discuss his tax issues.
- a. declined the meeting, but did ask for the answer to at least some of the questions he had posed on June 28th.²⁹
- b. asked for a bill to be sent for services rendered.³⁰
53. The Respondent sent a letter dated July 29, 1994 to addressing the questions about bankruptcy that raised in the June 28th meeting. The letter ends with following language,
- a. "However, as our prior discussion indicates, the law on this issue is uncertain and no unequivocal opinion can be rendered at this time. We ask that you review the contents of this letter carefully. We invite you to discuss any matters in it and our conclusions with us. We will be available to assist you with any proposal you might wish to make to liquidate this liability. Should you choose not to file a bankruptcy petition...we will also be available to suggest other alternatives which may result in the elimination of a substantial part of this liability or its total discharge."³¹
54. A memorandum³² was prepared containing alternatives for resolution of tax problems. The preparation of this memorandum was billed to the client, but the information contained within was never shared with him out of fear that he might

²⁸The bill was dated 6/25/94 (3 days before the office conference) and the services rendered were dated 6/24/94 (the date of the telephone conversation with the Respondent).

²⁹ testimony, R. 201-2.

³⁰ testimony, R. 203.

³¹Exhibit L.

³²Exhibit GG.

take the information and not pay the bill.³³

55. Approximately one week after receiving the July 29th letter, _____ received an Interim Fee Statement dated July 30, 1994 billing \$2,580.00.³⁴
56. _____ responded to the Interim fee statement dated July 30, 1994 by letter dated August 8, 1995 refusing to pay.³⁵ The letter alleges that _____ told _____ not to expend any time on the bankruptcy questions at the end of the June 28th meeting.
57. On August 31, 1994, Respondent sent _____ a letter³⁶ in response to his refusal to pay the \$2,580.00 bill. Respondent charged _____ at least an additional \$432.00 to respond to _____ refusal to pay.³⁷ The letter contained the following language, _____ of my office spent two hours in beginning to respond to the many factual errors in your letter. ... Your letter is completely off base, but it is consistent with your prior history of felonious behavior."
58. _____ submitted a complaint to the Commission dated September 12, 1994³⁸.
59. In _____ response to the \$2,580.00 bill, he expresses dissatisfaction with _____ lack of knowledge of whether "self-employment" taxes were dischargeable in bankruptcy.³⁹ He states that dissatisfaction to support his position that no further work was requested. _____ complaint to the Commission, however, expresses a dissatisfaction with the Respondent's lack of knowledge concerning the nondischargeability of employment taxes.⁴⁰ In his testimony, _____ states he was trying to discharge "income taxes," "the kind of tax that would show up on a form '1040'".⁴¹

³³Testimony of _____ R. 204.

³⁴Exhibit AJ.

³⁵Exhibit R, 3 & 4.

³⁶Exhibit H.

³⁷Exhibit AJ, next to last page. Of the \$572 billed, \$140 might be for review of the July 29th letter because the time entry dated 8/3/94 indicates review of letter, and there is no other letter to have been reviewed at that time except the July 29th letter.

³⁸Exhibit R.

³⁹Exhibit D.

⁴⁰Exhibit R and R. p 67.

⁴¹R. 65.

60. The following actions of _____ are inconsistent with his statements that he intended no further work be done after the June 28th meeting:
- a. He left, at the close of the meeting, some materials (Exhibits C & I) which were confidential in nature and which would have been necessary or useful in further research of the questions raised about bankruptcy by _____.
 - b. As he was leaving the meeting, he signed and dated a Fee Agreement⁴² containing language clearly anticipating work yet to be done.
 - c. When _____ contacted _____ on July 27th to set up a further conference, _____ asked for the answers to some of the questions he had posed on June 28th.
 - d. The work done was in regard to bankruptcy which _____ indicated was not an option, yet he filed for bankruptcy on April 21, 1995 later dismissing the action June 23, 1995 on his own motion.⁴³
61. _____ either anticipated further work on the questions he raised, or he allowed the impression that he anticipated further work.
62. _____ credibility is impaired by the following facts:
- a. He was convicted of 2 counts of forgery on April 11, 1990.⁴⁴
 - b. He makes the statement in his Complaint to the Commission that the meeting with _____ and the Respondent occurred on June 24th when it actually was on June 28th then testifies that he believed the \$52.50 bill was for the meeting. He admits he thought it was quite low for the amount of time he spent in the office, but also indicates that belief as justification for not paying any of the \$2,580.00 bill.
 - c. _____ did not disclose all the information he knew which would have been of assistance to _____ and _____ in addressing his concerns.
 - d. He was inconsistent in his representation of the type of taxes he was attempting to discharge, including the nature of penalties assessed and whether certain taxes were employment taxes (withheld from the wages of employees) or self-employment (income) taxes. _____ is a former CPA and certainly knew the significance of this distinction. Furthermore, the particular instances of these inconsistencies have a tendency to bolster his position in the context in which they occur.
63. In determining the reasonableness of the fee charged to _____ there is no indication that the bill should have been more or less than the customary fee due to the (1) time and labor required, (2) the likelihood of the attorney being precluded

⁴²Exhibit AJ, 4.

⁴³Exhibits AK and FF.

⁴⁴R. 65.

from other work,⁴⁵ (3) time limitations (4) the nature of the professional relationship or (5) the issue of a contingent fee.

64. The only relevant factors in determining reasonableness of the fee under these facts are (1) the customary fee and (2) the amount charged in relation to the results obtained.

CONCLUSIONS OF LAW

1. The Commission has the burden of proving each and every allegation by clear and convincing evidence.
2. In determining the penalty for misconduct, the Court takes into consideration the specific acts of misconduct, the Court's responsibility to preserve the integrity of the Bar, and the risk to the public in permitting the Respondent to continue in the profession. In re Welke, (1984) Ind., 459 N.E.2d 725; In re Callahan, (1982) Ind., 442 N.E.2d 1092.
3. Only the charges as alleged in the Complaint may be considered and ruled upon by the Hearing Officer. In re Roberts, (1983) Ind., 442 N.E.2d 986; In re McCarthy, (1984) Ind., 466 N.E.2d 442.
4. Because a discipline proceeding results in a potential penalty, an attorney is entitled to procedural due process, which includes fair notice of the charge(s). In re Ruffalo, (1968) 390 U.S. 544, 88 S.Ct. 1222, 1226 citing In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682.
5. The Court may consider uncharged conduct as part of the entire course of conduct in determining the penalty to be imposed if supported by the evidence in the record and if it relates to any finding of misconduct which was appropriately made. In re Roberts, (1983) Ind., 442 N.E.2d 986, 988.

COUNT I

6. The Respondent's action with respect to Count I (the Dual letterhead and Trade name allegations), **violated Rule 7.2(a)** because the dual letterhead was used in such a way as would create confusion regarding the identity and responsibility of those practicing law or performing services in support of the law practice and

⁴⁵The Respondent did indicate in his testimony that he had plenty of work, but if this fact alone were enough to justify an increased fee, then all busy attorneys would be charging fees above the "customary" in the practice.

because it contained a statement⁴⁶ which was self-laudatory, deceptive and unfair regarding the qualifications of the Respondent.

7. The Respondent's action **violated Rule 7.2(b)** because the name "Professional Services Group" was used in such a way that it was misleading as to the identity, responsibility and status of individuals who did work for the Respondent's law practice.

COUNT II

8. The Respondent's action with respect to Count II (the grievance of _____), **did not violate Rule 1.2(a)**.
9. It is unreasonable for an attorney to charge both a finance charge for an unpaid bill and hourly rates to respond to a refusal to pay and/or to demand payment.
10. The Respondent's action with respect to Count II, **violated Rule 1.5(a)** because
- the hourly billing arrangement was unusual and not adequately communicated to the client,
 - the amount billed was substantial,
 - there was no affirmative action taken toward actual collection of the debt,
 - there was no result of benefit to the client,
 - over half the bill was for action calculated to collect a fee, and
 - approximately one third of the amount billed was to respond to the client's refusal to pay the bill after the client clearly terminated the representation.
11. The Respondent's action with respect to Count II, **did not violate Rule 5.3©** because _____ was not a non-lawyer assistant.
12. The Respondent's action with respect to Count II, **did not violate Rule 8.4(a)**.⁴⁷

COUNT III

⁴⁶"We help you create and preserve wealth"

⁴⁷_____ quickly obtained substantial information from _____ and from his own investigation and knew or should have known how to proceed, but instead chose to move forward in a broad and uneconomical manner charging _____ research and precautionary measures without taking any action whatsoever which was reasonably calculated to actually collect the debt owed to the client. _____ actions probably violated Rule 1.2(a) in not abiding by _____ request to write a letter, but without the testimony of _____ the evidence is not adequate to support that merely writing a letter was in fact the instruction of the client. The engagement letter supports the position that a broader pursuit of collection was authorized after the request for a letter if that was, in fact, the initial request.

13. Respondent's actions with respect to Count III (the allegation by) **did not violate Rule 1.2(a)** because , although he insists to the contrary, clearly anticipated further work on the bankruptcy questions discussed at the June 28, 1994 meeting.
14. Respondent's actions with respect to Count III **violated Rule 1.5(a)** because:
- The fee charged for the work done was excessive,
 - a meeting with an accountant as a substantial part of a consultation for legal problems involving tax issues would indicate a substantial level of experience could be expected, but the time taken in conjunction with the results does not reflect the same,
 - the amount billed was over \$3,000.00, and the result was almost nothing of benefit to the client, and
 - there was work done and results obtained which were billed to the client but withheld from him.
15. Respondent's actions with respect to Count III **violated Rule 8.4(a)**. Respondent was the responsible party billing for the work, and knew or should have known that the research conducted by and was excessive considering the nature of the questions to be addressed and the results obtained and shared with the client.

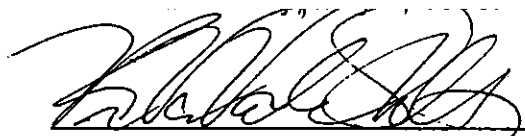
MITIGATING AND AGGRAVATING CIRCUMSTANCES

1. Mitigating the allegations is the fact that the Respondent has now discontinued the use of the dual letterhead, the name "Professional Services Group," and the phrase, "We help you create and preserve wealth."
2. Aggravating the allegations are the following facts:
- The fee agreement presented to and is so ambiguous that it fails completely to communicate the fee that will be charged.
 - Time was spent and billed to "in beginning to respond to the many factual errors..." and the errors were not pointed out or responded to specifically in order to give an opportunity to rebut. The general purpose of Exhibit H seems to have been mud slinging and not a genuine attempt to resolve the dispute regarding fees. Certainly letter refusing to pay the fee in the first place was no better, but the Respondent's participation reflects unfavorably on the legal profession.

RECOMMENDATIONS

1. With respect to Count I, for violation of Rules 7.2(a) & (b), this hearing officer respectfully recommends a private reprimand.

2. With respect to Count II, for violation of Rule 1.5(a), this hearing officer respectfully recommends a reprimand, but declines to recommend whether the reprimand should be private or public.
3. With respect to Count III, this hearing officer respectfully recommends a reprimand, but declines to recommend whether the reprimand should be private or public.



KIM VAN VALER SHILTS

Hearing Officer

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